No. 11433

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT DEL GUERCIO, District Director, Immigration and Naturalization Service, Department of Justice, District No. 16,

Appellant,

vs.

SEBASTIAN GABOT,

Appellee.

APPELLANT'S REPLY BRIEF.

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Appellee's brief for the most part is centered upon the argument that because petitioner was "lawfully admitted" to Hawaii on September 9, 1927 and "lawfully admitted" to the mainland of the United States on July 11, 1929, his departure to Mexico and return to the United States on March 20, 1934, cannot be construed as an "entry", relying upon the authority of *Annello v. Ward,* 8 F. Supp. 797. (App. Br. pp. 2, 3 and Part III.)

Counsel argues that even if the immigration laws are to be given effect to appellee's entry from Mexico on March 20, 1934, so as to fix the time of commission of the crime as being within five years of last entry, departure and re-entry to the United States under such circumstances could not be construed as an "entry" within the meaning of the immigration laws. The first part of the Government's argument will be directed to that issue.

"Entry" Within the Meaning of the Immigration Laws.

The *Annello v. Ward* case relied on by counsel clearly is not the law. The case refers to four leading decisions of the Supreme Court construing what constitutes an entry within the meaning of the immigration laws and dismisses all of them with the statement that "In my opinion it is carrying the application of the doctrine of the above cases too far to regard as an immigrant one who is lawfully within the country and who goes into foreign contiguous territory during the course of a practically continuous journey originating and ending at the same place within the United States."

The fallacy of the decision lies in the conclusion that in order to establish an "entry" it must be shown that the alien comes within the statutory definition of an "immigrant" as set forth in section 3 of the Immigration Act of May 26, 1924 (8 U. S. C. 203), reading in part:

> "When used in this Act the term 'immigrant' means an alien departing from any place outside the United States destined for the United States except * * *
>
> (4) An alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory * * *."

Granting of immigration visas began with the Immigration Act of May 26, 1924. Under the act aliens were placed under a classification, for documentary and statistical purposes, of "immigrant" with certain groups being excepted from the classification. The classes excepted from the term "immigrant" are for convenience referred to as "non-immigrants." Whether an alien be regarded as an

"immigrant" and required to present a visa when he seeks admission (or be exempt from the presentation of documents by virtue of having been previously lawfully admitted for permanent residence), or whether he came within the classification of a "non-immigrant" and required to present other type documents the fact remains that both classes, whether seeking entry from a foreign place for the first time, or reentry after a temporary departure from the United States, are required to undergo immigration inspection, and are subject to all the laws and regulations pertaining to the exclusion of aliens. The Second Circuit Court of Appeals states the law in this respect as follows:[1]

> "Section 13(b) of the Immigration Act of 1924 (8 U.S.C.A. 213(b)) provides that immigrants who have been legally admitted to the United States, and who depart therefrom temporarily, may be readmitted without being required to obtain an immigration visa under such conditions as may be by regulations prescribed. But the regulations which permit aliens previously legally admitted to return from Canada within six months without having a passport, visa, or permit neither purport to nor could, in view of the express words of section 19, *supra,* dispense with inspection. Certain identification of aliens, if nothing more, is vital to the enforcement of the immigration laws and without inspection at the border any proper administration would be impossible."

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[1]*United States v. Day,* 2d Cir., 45 F. (2d) 112.

It is not the classification of "immigrant" or the exception from that class as "non-immigrant" that determines whether an alien has effected an "entry" into the United States, but, rather, whether the alien has in fact come into the United States from a foreign port or place, whether or not inspected. Aliens were making "entries" and "re-entries" into the United States long before being classified under the Act of May 26, 1924, as "immigrant." Under the holding in the *Annello v. Ward* case a lawful resident alien making a temporary sojourn in foreign contiguous territory could commit a crime involving moral turpitude and if he admitted the fact the law would not exclude upon his return, neither would he be subject to deportation on a charge of having admitted the commission of such a crime prior to "entry" because under the reasoning of the court the alien's return to the United States would not under the law constitute an "entry."

If it had been charged in the deportation proceeding that the subject was an alien required to present certain documents at the time of re-entry, the classification of "immigrant" or "non-immigrant" would have been important because it would have been necessary to ascertain whether the alien was possessed of the appropriate documents. Deportation in the *Annello v. Ward* case being predicated upon conviction of a crime involving moral turpitude committed within five years after entry, for which the alien was sentenced to imprisonment for a term of one year or more, "It is immaterial whether he was entitled to admis-

sion or whether he lawfully entered. The cause for which his deportation was ordered arose after entry."[2]

The decision is also *contra* to the decisions of the Circuit Courts of Appeal in the First[3] Second,[4] Fifth,[5] Sixth,[6] Seventh,[7] Eighth,[8] and Ninth Circuits.[9]

Validity of Regulation.

As to Part II of Appellee's brief (pp. 6 to 7) the argument of the Government set forth in Part II of its opening brief (pp. 11 to 13) is adopted herein.

Neither of the two cases cited by Appellee involve the construction of a regulation which is restrictive or in conflict with an act of Congress enacting a particular law and authorizing promulgation of regulations thereunder.

Our contention is that the regulation in question is valid if given the proper application. By a proper application the regulation does not conflict or restrict the full application of the 1917 and 1924 Immigration Acts to citizens of the Philippine Islands after May 1, 1934, when Congress declared those Acts should be applied to Philippine

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[2]*United States ex rel. Claussen v. Day,* 49 S. Ct. 354, 279 U. S. 398, 73 L. Ed. 758.

[3]*Ward v. De Barros,* 1st Cir., 75 F. (2d) 34.

[4]*United States v. Day,* footnote No. 1, *supra.*

[5]*Guarneri v. Kessler,* 5th Cir., 98 F. (2d) 580.

[6]*Jackson v. Zubrick,* 6th Cir., 59 F. (2d) 937.

[7]*Ng Sui Wing v. United States,* 7th Cir., 46 F. (2d) 755.

[8]*Medich v. Burmaster,* 8th Cir., 24 F. (2d) 57.

[9]*Ali v. Haff,* 9th Cir., 114 F. (2d) 369.

citizens in the same manner as to other aliens, with the exception of section 13(c) of the 1924 Act (8 U. S. C. 212(c)). The regulation applies only to "acts or conditions" that would have under the 1917 and 1924 Acts constituted grounds for deportation occurring between the effective dates of those acts and May 1, 1934. It will be noted that the regulation does not by its provisions prevent the exclusion (as distinguished from deportation) of citizens of the Philippine Islands for "any act of his" that occurred or "condition" that existed prior to May 1, 1934. Supposing in the example given in Government's opening brief (top of p. 9) such Philippine citizen departed to a foreign country after May 1, 1934 and thereafter sought re-entry. Clearly, such person would come within the criminally excluded classes enumerated in section 3 of the Immigration Act of 1917 (8 U. S. C. 136) providing:

> "That the following classes of aliens shall be excluded from admission into the United States: * * * persons who have been convicted or admit having committed a felony or other crime or misdemeanor involving moral turpitude * * *."

Following the construction placed on the regulation by the District Court, if such Philippine citizen clandestinely reentered the United States, he could not be deported because the criminal "acts of his" occurred prior to May 1, 1934. Under a proper application of the regulation such a person while not subject to deportation if he remained

in this country could be deported if he left the United States and were successful in regaining entry, in that section 19 of the Immigration Act of 1917 (8 U. S. C. 155(a)) provides:

> "That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law * * * shall, upon the warrant of the Attorney General, be taken into custody and deported."

To follow the construction of the District Court would lead to the result that the class of criminal Philippine citizen mentioned in the example who left the United States after May 1, 1934, without breaking the continuity of his residence and surreptitiously regained entry subsequent to that date would not be amenable to deportation whereas the Philippine citizen having the same identical criminal record who either broke the continuity of his residence by leaving the United States after May 1, 1934, or who for the first time entered the United States without detection after May 1, 1934, would be subject to deportation. It is axiomatic that statutes are to be construed so as to avoid absurd results.[10]

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[10] *Lau Ow Bew v. United States*, 12 S. Ct. 517, 144 U. S. 47, 36 L. Ed. 340.

Is "Entry" a Part of the Deportable Ground Where There Is a Conviction and Sentence for a Year or More for the Commission of a Crime Involving Moral Turpitude Committed Within Five Years After Entry?

Appellee quotes the remarks of the District Court for his argument under Part I of his brief (pp. 4, 5). The Court came to the conclusion that "it took the concurrence of the two acts", and that therefore "entry" was a part of the deportable ground. To the argument of Government's opening brief set forth in Part I (pp. 7 to 11), we add a reference to the decision of this Honorable Court filed on January 22, 1947, since writing our opening brief, in the case of *Del Guercio v. Delgadillo,* No. 11235, wherein the same deportable ground was under consideration and it was pointed out that deportation was predicated upon the conviction of crime and not upon the fact of entry.

It is noted that by a further regulation of the Attorney General relating to Philippine citizens entry prior to May 1, 1934, is considered in determining their immigration status for the purpose of receiving a reentry permit. The regulation is set forth in section 172.10, Title 8, Code of Federal Regulations, as follows:

> "172.10. Philippine citizens; returning residents; reentry permits. (a) A citizen of the Philippine Islands lawfully admitted to the United States, * * * for permanent residence and whose original entry occurred after April 30, 1934, may make application for a reentry permit in the same manner as an alien. Such an application may also be made by a citizen of the

Philippine Islands *whose residence in the United States, * * * began prior to May 1, 1934* and who has continued to maintain his residence in the United States." (Italics added.)

The entry prior to May 1, 1934, may also be considered in determining whether Appellee is deportable on the ground of having been sentenced to imprisonment for a year or more for the commission of a crime involving moral turpitude committed within five years after entry.

Respectfully submitted,

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